NO. 82-5128

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

JAMES MATHIS,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF
CERTIORARI TO THE GEORGIA SUPREME COURT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

When a jury in a capital case has imposed two death peanlties after finding three statutory aggravating circumstances as to each murder, all the circumstances being based on properly admitted evidence, should the death penalties be vacated because two of the statutory aggravating circumstances (one as to each murder) are later set aside?

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STATEMENT OF THE CASE

A. Proceedings in the courts below.

During the December, 1980 term of the Superior Court of Douglas County, Georgia, Petitioner James Mathis was indicted for the murder, armed robbery, and kidnapping of J. L. Washington and the murder, rape, and kidnapping of Ruby Washington. The indictment alleged that Petitioner committed these offenses on November 27, 1980. (R. 4-5). Petitioner was tried on this indictment before a jury in the Douglas County Superior Court on May 26-27, 1981. The jury found Petitioner guilty of all the charges except rape. (T. 695-96; R. 61-62). In the sentencing phase of the trial, the State offered evidence of Petitioner's two prior convictions for assault with intent to rape, and other convictions for sodomy and robbery by force. (T. 705-07). Sheriff Earl Lee testified that during a previous robbery, Petitioner had also severely beaten his victim about the head with a blunt instrument. (T. 708-09). Finding six statutory aggravating circumstances, the jury fixed Petitioner's punishment on each murder conviction as death. (T. 734-35; R. 63-68). Petitioner was sentenced to life imprisonment on each kidnapping charge and 20 years for the armed robbery. (T. 747-50; R. 68-69).

Petitioner appealed his convictions to the Georgia Supreme Court. The court upheld all of his convictions. The court also upheld his death sentences, although it found that one statutory aggravating circumstance as to each sentence was not supported by sufficient evidence. Mathis v. State, 249 Ga. 454 (1982).

Construing the evidence in a light most favorable to the State, it showed the following facts. Petitioner ate Thanksgiving dinner on November 27, 1980 with his sister who lived across a courtyard from the apartment where J. L. "Sparky" Washington and Ruby Washington lived. (T. 237-38, 585). Petitioner was wearing green pants, a matching jacket, black shoes, and a brown sweater. (T. 237-38). His clothes were clean at that time. (T. 240). While his sister was in the bathroom, Petitioner departed. When she returned from the bathroom, she saw that her brother was gone and she saw Mr. Washington's car pass beside the building. Petitioner's sister saw that both Mr. and Mrs. Washington were in the car, though she could not tell if anyone else was. (T. 238-40).

Petitioner was given a ride from his sister's apartment by the Washingtons. The Washingtons, who were on their way to eat Thanksgiving meals with two of their children (T. 229, 231), stopped and offered Petitioner a ride as he walked near the apartments from which they had all just come. (T. 396, 435, 457-62, 588). Petitioner rode in the back seat while the Washingtons rode in the front. (T. 244-45).

Petitioner commandeered the car. While riding in the back seat, he grabbed the pistol that Mr. Washington customarily carried. (State's Exhibit 1, T. 225-26, 249, 563-64). The force of Petitioner's grabbing of the pistol caused a belt loop on Mr. Washington's trousers to break and also resulted in an abrasion to his side opposite the holster. (T. 507, 518-19). Petitioner then forced Mr. Washington to drive to an abandoned sawmill road. (T. 334, 457-62).

Petitioner robbed, stabbed, and shot and killed Mr. Washington. Petitioner emptied Mr. Washington's billfold. (T. 261-62, 293-94, 299, 507). He also took a pocket knife from Mr. Washington. (T. 226-27, 289, 319-21). Petitioner stabbed Mr. Washington several times with the pocket knife. (T. 514-18). Then he shot him in the top of the head. The bullet exited through Mr. Washington's right eye -- destroying his eyeball and glasses' lens. Mr. Washington suffered other bullet wounds to his wrist and left chest, but these could have been caused by the same bullet that was fired into his head. (T. 511-12, 517, 548). The gunshot wound to Mr. Washington's head caused his death. (T. 520).

Petitioner then raped, stabbed, stomped, and shot Mrs. Washington. After shooting her husband, Petitioner forced Mrs. Washington to walk to where her husband lay. He stabbed her on either side of her mouth and four times in her left chest. Two of the stab wounds penetrated her stomach and one pierced her heart. (T. 457-62, 523-27, 537, 541). Petitioner told another prisoner at the Douglas County Jail that he cut her because she "wouldn't make no play." (T. 457-62). Although the jury acquitted him of the charge, the evidence also showed that Petitioner raped Mrs. Washington: Male spermatozoa was found in her vagina and there were several lacerations along her vaginal walls. (T. 457-62, 479-80, 529-32). Dr. Byron Dawson of the Georgia Crime Laboratory testified that the rape would probably have been painful to the victim. (T. 530-31, 546). Mrs. Washington's legs were bruised and her underclothes filled with vegetable debris -- from the violent rape. (T. 522-528). Because Mrs. Washington refused to stop crying about her husband, Petitioner said "Hell, I might as well go on and kill you, too." (T. 457-62). He then shot her twice in the left side of her head. She also suffered a gunshot wound to her

left hand, though it may have been caused by one of the two bullets that Petitioner fired into her head. (T. 457-62, 523-25, 527-28, 548). At some point Petitioner struck Mrs. Washington three times on the back of her head with a blunt instrument and applied sufficient pressure, probably by dint of his feet and/or knees, to her chest so as to fracture some ten ribs. (T. 523-33, 536, 540). She died from the combined effect of the chest stab wound and subsequently inflicted gunshot wounds to her head. (T. 537, 540-41, 547).

Having carried out his murderous designs, Petitioner left the bloody scene (T. 339-40, 353-54, 420-21) with his newly-acquired money, pistol, and pocket knife. (T. 289). Petitioner's once clear clothes were now dirty. (State's Exhibit 3; T. 262-63, 417, 436). A gray Caucasian hair was found on his jacket. (T. 494-95). He spent and gambled away the wad of money that he had stolen. (T. 261-62, 293-94, 299, 507). When he ran out of money, he pawned the pistol and the knife. (T. 295, 303-05, 314-15, 319-21, 328). It was later established by ballistics comparisons that the gun pawned by Petitioner was definitely used to fire the bullet recovered from Mr. Washington's wrist and probably used to fire another bullet found at the scene. (State's Exhibit 4, 5; T. 471-74, 517-18, 563-64).

SUMMARY OF ARGUMENT

The issue of the effect upon a death penalty of the invalidation of one of multiple statutory aggravating circumstances is before the Court in Zant v. Stephens, 631 F.2d 397 (5th Cir. 1981), mod., 648 F.2d 446, cert. granted, ___U.S.___, question certified to Georgia Supreme Court, ___ U.S.___ (May 3, 1982). The result in Stephens will probably control this case.

Stephens was wrongly decided by the Fifth Circuit. This Court's decision in Stromberg v. California, 283 U.S. 359 (1931), does not affect the validity of Petitioner's death sentences. Unlike the general verdict in Stromberg, the verdict in question here contained specific findings. Moreover, the sentences of death in this case are not based upon the statutory aggravating circumstances. Thus there is no risk that the sentences are grounded on impermissible bases. In addition, Stephens was wrongly decided because both there and here all evidence considered by the respective juries in making their sentencing decisions was properly before them. The invalidation of less than all of the statutory aggravating circumstances could have no effect on the sentences because no evidence was improperly admitted and it is upon the evidence that the death sentences are based.

ARGUMENT

The only issue presented here is whether the validity of Petitioner's death sentences is affected by the Georgia Supreme Court's holding that two of the six aggravating circumstances found by the jury are not supported by sufficient evidence. The Georgia Supreme Court found that there is insufficient evidence to support the jury's finding that Petitioner "committed the murder of Ruby Washington while engaged in the armed robbery of Ruby Washington." The court also found that the evidence does not support the jury's finding that the murder of J. L. Washington falls within the circumstance defined in Ga. Code Ann. § 27-2534.1. However, because two valid statutory aggravating circumstances remain as to each murder, the Georgia Supreme Court -- in accordance with its prior decisions -- upheld both death sentences. Mathis, supra, at 460. Thus, Petitioner is wrong in his suggestion that two statutory aggravating circumstances were found to be unconstitutional.

This case will probably be governed by the outcome of Zant v. Stephens, 631 F.2d 397 (5th Cir. 1981), mod., 648 F.2d 446, cert. granted, ___U.S.___, question cert. to Ga. S. Ct., ___U.S.___ (May 3, 1982). The only significant difference in this case and Stephens is that here the statutory aggravating circumstances held to be invalid were found to be supported by insufficient evidence. In Stephens, however, the Georgia Supreme Court held that one of the statutory aggravating circumstances was facially unconstitutional. Stephens v. State, 237 Ga. 259 (1976).

Thus, Respondent's argument here is the same as that which has been made in Stephens. The Fifth Circuit's decision in that

case is based upon an erroneous interpretation of Stromberg v. California, 283 U.S. 359 (1931).

First, in Stromberg v. California, supra, this Court was concerned with a trial jury's return of a general verdict of guilty which could have rested upon any of three grounds one of which was clearly impermissible. Because the verdict returned was a general one, it was impossible to determine whether the jury's verdict rested on the unconstitutional ground since the jury had been instructed in the disjunctive. A similar circumstance was addressed in Bachellar v. Maryland, 397 U.S. 564 (1970), also relied upon by the Fifth Circuit in Stephens. The verdicts in question here are not, however, general ones. Six statutory aggravating circumstances were specified in writing by the jury. No contention has been, or could be, made that any evidence considered by the jury was inadmissible. And, a finding of any one statutory aggravating circumstance as to each murder would have authorized imposition of the two death sentences. See Stephens, supra, 631 F.2d at 406.

Even though in Stephens the Fifth Circuit clearly indicated that the remaining two statutory aggravating circumstances were amply supported by the evidence and properly before the jury, that either would be sufficient to authorize imposition of the death penalty, that the evidence submitted in support of the later invalidated statutory circumstance was also admissible and properly considered by the jury, and even though only one statutory aggravating circumstance need be found under Georgia law to authorize imposition of the death penalty, the court held that the invalidation of one imbued the deliberation and verdict with constitutional error because it "may" have affected the jury.

A brief discussion of the relationship in Georgia between statutory aggravating circumstances and death sentences might prove helpful. The finding of statutory aggravating circumstances is required by Georgia law in order for a sentencing authority to consider imposition of the death penalty. This procedure directs and limits the sentencer's discretion. Gregg v. Georgia, 428 U.S. 153 (1976). Once a statutory aggravating circumstance has been found, the sentencing authority decides the separate issue of what sentence to impose. Even though single, or even multiple, statutory aggravating circumstances have been found, the sentencer need not impose the death penalty. Spivey v. State, 241 Ga. 477, 481 (1978), cert. denied, 439 U.S. 1039, death sentence vacated sub nom, Spivey v. Zant, 661 F.2d 464 (1981), cert. denied, ___U.S.___; Cox v. State, 248 Ga. 713 (1982) (jury found two statutory aggravating circumstances and sentenced defendant to life imprisonment). Thus, the sentencing decision is a separate determination based upon all of the evidence, and not upon statutory aggravating circumstances.

The Stephens decision is wrong, therefore, on two grounds: (1) the verdicts returned there and here were not general ones, because the juries listed specific circumstances supported by the evidence which authorized them to consider imposing the death penalty, and (2) the invalidation of less than all of the statutory aggravating circumstances had no effect, or no impermissible effect, because the juries were properly allowed to consider all admitted evidence in determining the appropriate punishment.

Thus, the death sentences imposed upon Petitioner should not be disturbed.

CONCLUSION

The instant petition should not be granted because the Georgia Supreme Court has not "decided a federal question in a way in conflict with applicable decisions of this Court" nor do any other "special and important reasons" militate in favor of review. Rules of the S. Ct. 17.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, George M. Weaver, Attorney of Record for the Respondent herein, and a Member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of the foregoing Brief for Respondent in Opposition upon the Petitioner by depositing this day a copy of same in the United States Mail, with proper address and adquate postage thereon to:

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This 27th of August, 1982.

George M. Weaver
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